

There is not, in my opinion, that clear and convincing proof of a contract for the sale of land and acts of part performance, which must be produced to take a case out of the statute of frauds. There was some agreement, no doubt, between these parties, but what it was, what were its terms and conditions, does not appear, and it is impossible, I think, to say that the act of part performance relied upon, could have been with no other view or design than to perform the agreement set up in the bill; which, as the cases prove, is indispensably necessary to entitle the party to a specific performance.

He must show acts, unequivocally referring to and resulting from that agreement, such as the party would not have done unless on account of that very agreement. In this respect, I think, the present case is deficient, and therefore a specific performance cannot be decreed.

But, there is another, and, in my judgment, insuperable objection to granting the complainant relief upon this bill. The intestate never was in a condition to complete the title, and the cases are abundant to show, that unless a party is ready and competent to perform the contract on his part, he cannot call for a specific performance from the other side. *Benedict vs. Lynch*, 1 Johns. Ch. Rep., 370, and the cases referred to by Chancellor Kent in that case are conclusive upon the subject.

The title to the land in this case was, and is, in George H. Stewart, who sold to Beard, and to whom more is due than the land, according to the proof, would now sell for. Stewart says in his answer, that he never would have sanctioned such a loose contract as is set up by this bill, and it is alleged by him, and it is in proof, that he is now prosecuting an independent bill in this court, against the widow and heirs of Beard for the sale of the land to pay his claim, and he insists that he should not be embarrassed or delayed in the prosecution of his suit, by the proceedings in this.

The remedy in these cases of specific performance must be mutual, and if one of the parties is not bound, or is not able to perform his part of the contract, he cannot call upon the court to compel a performance by the opposite party. *Benedict vs.*